83-839

No.

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN PAUL HAWTHORNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

A. Whether the prolonged detention of an individual in the secondary inspection area of a permanent traffic checkpoint must be supported by probable cause.

B. Whether the petitioner freely and voluntarily consented to a search of the trunk of his vehicle.

TOPICAL INDEX

	PAGE
Petitioner prays for Writ of Certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit	1
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Facts	3
Reasons Why the Writ Should be Granted	5
Argument	7
A. Prolonged detention of an individual in the secondary inspection area of a permanent traffic checkpoint must be supported by probable cause	7
B. The petitioner did not freely and voluntarily consent to a search of the trunk of his vehicle	10
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Adams v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972)	8
Almeida-Sanchez v. *United States*, 413 U.S. 266, 93 S.Ct. 2535 (1973)	6
Brown v. *Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979), citing *Delaware* v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), *United States* v. *Brignoni-Ponce*, 442 U.S. 873, 95 S.Ct. 2574 (1975)	8, 9
Bumper v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968), accord, *United States* v. *Henry*, 615 F.2d 1223 (9th Cir. 1980), *United States* v. *Agosto*, 502 F.2d 612 (9th Cir. 1974)	10
Dunaway v. *New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979)	9
Florida v. *Royer*, __ U.S. __, 103 S.Ct. 1319 (1983)	9
Judd v. *United States*, 190 F.2d 649 (D.C. Cir. 1951), citing *United States* v. *Novero*, 58 F.Supp. 275 (E.D. Mo. 1944)	11
Reid v. *Georgia*, __ U.S. __, 100 S.Ct. 2752 (1980)	9
Schneckloth v. *Bustamonte*, 412 U.S. 219, 93 S.Ct. 2041 (1973)	11
Terry v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)	7, 8
United States v. *Abbott*, 546 F.2d 883 (10th Cir. 1977)	10
United States v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975)	9

	PAGE
United States v. *Cortez*, __ U.S. __, 101 S.Ct. 690 (1981)	9
United States v. *Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074 (1976)	6, 7, 9, 10
United States v. *Ocheltree*, 622 F.2d 992 (9th Cir. 1980)	11, 12
United States v. *Ortiz*, 422 U.S. 891, 95 S.Ct. 258 (1975)	5, 6, 9
United States v. *Page*, 302 F.2d 81 (9th Cir. 1962)	11
United States v. *Patacchia*, 602 F.2d 218 (9th Cir. 1979)	9
United States v. *Rothman*, 492 F.2d 1260 (1973)	11
United States v. *Soto-Soto*, 598 F.2d 545 (9th Cir. 1979)	9
Weed v. *United States*, 340 F.2d 827 (10th Cir. 1965)	11
United States Constitution	
Fourth Amendment	7

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

This is a petition for John Paul Hawthorne for a Writ of Certiorari to review the Memorandum Opinion filed by the United States Court of Appeals for the Ninth Circuit on October 7, 1983, affirming petitioner's conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1). The United States Court of Appeals for the Ninth Circuit ruled that the trial court judge did not improperly deny a motion to suppress certain evidence seized from the petitioner's vehicle pursuant to a warrantless search. Specifically, the Court concluded that the detention of the petitioner in the secondary inspection area of the San Clemente Border Patrol Checkpoint, for brief questioning and a subsequent request to open the trunk of his vehicle, did not require any probable cause or founded suspicion. The Court also upheld the search of the vehicle on the ground that the petitioner had voluntarily consented to the search.

OPINIONS BELOW

To the petitioner's knowledge, the Memorandum Opinion in the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction, has not been officially or unofficially reported as yet. (A copy of the Memorandum Opinion is attached to the Appendix hereto.)

JURISDICTION

1. On February 2, 1983, the Federal Grand Jury for the Southern District of California returned a two-count Indictment against petitioner, charging violations of 21 U.S.C. §841(a)(1), possession of cocaine and marijuana with intent to distribute.

2. After petitioner's Motion to Suppress Evidence was denied on March 3, 1983, petitioner was tried on April 13, 1983, before the Honorable Leland C. Nielsen, United States District Judge, on "stipulated facts", and was convicted of possession of cocaine with intent to distribute (Count One). On May 31, 1983, petitioner was committed to the custody of the Attorney General for a period of three (3) years. In addition, a Special Parole Term of ten (10) years was imposed pursuant to 21 U.S.C. §841(b)(1)(A). Petitioner thereafter filed a timely Notice of Appeal.

3. On October 7, 1983, the United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction.

4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourth Amendment to the United States Constitution.

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the places to be searched and the persons or things to be seized."

2. Title 21, United States Code Section 841(a)(1).

"841 Prohibited Acts. A—Unlawful Acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, a controlled substance."

STATEMENT OF THE FACTS

On January 21, 1983, at approximately 1:30 p.m., Border Patrol Agent Howard Schroeder was screening traffic at the San Clemente Checkpoint when an old Volkswagen Bug driven by the petitioner approached his location. Agent Schroeder directed the petitioner to stop his vehicle and the agent then walked up along side and asked the petitioner how he was doing. In a low tone and voice, the petitioner responded "Fine". The petitioner kept looking straight up the road throughout this brief encounter, except for the one time when he briefly glanced at the agent and gave the affirmative acknowledgment. Because the petitioner appeared ner-

vous to some degree, and because of the vehicle's run-down condition which is typical for a vehicle involved in alien smuggling, Agent Schroeder directed the petitioner to pull off into the secondary inspection area.

Once in the secondary area, Border Patrol Agent George Pratt made initial contact with the petitioner and, through questioning, determined that he was a United States citizen. Agent Pratt then asked the petitioner to open the trunk of the vehicle, but the petitioner reached inside the glove box, instead, and attempted to hand the vehicle registration to Agent Pratt. Thinking that he did not understand the first time, Agent Pratt again asked the petitioner if he could open the trunk of the vehicle, and the petitioner said "No problem". The petitioner then exited the vehicle and opened the trunk.

As soon as the trunk was opened, Agent Pratt allegedly smelled a strong odor of marijuana.[1] Inside the trunk was a large, dark colored trash bag which Agent Pratt asked the petitioner to open a little wider. When the petitioner complied, Agent Pratt saw that it contained a green, leafy substance that looked like marijuana. Agent Pratt then placed the petitioner under arrest and advised him of his constitutional rights.

Border Patrol Agent Michael Nicley, when he observed Agent Pratt arresting the petitioner, came to the front of the vehicle, looked into the trunk, and saw the dark plastic bag containing the marijuana. Agent Nicley also saw a briefcase lying next to the plastic bag and he requested Agent Pratt to ask the petitioner for the combination. At some point, Agent Nicley was able to open the briefcase and found cocaine inside.

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1. In an experiment authorized by the court, a defense investigator was not able to detect any odor of marijuana emanating from the trunk of the vehicle under similar conditions as those on the day of the petitioner's arrest.

The petitioner testified that as he approached the checkpoint, he got in line behind approximately ten cars. As his turn came up, he looked at the agent to be waived on through, but the agent held up his hand signifying that the petitioner should stop. The agent initially looked inside the driver's side window and then walked all around the car looking through the rear window into the back of the vehicle. He thereafter approached the driver's side and directed the petitioner to pull over to the side of the road. During this entire time, the petitioner continually looked at the agent to see what he was doing.

After he pulled over into secondary, the petitioner was approached by another agent who told the petitioner to open the trunk. The petitioner was in the process of pulling the registration papers out of the glove compartment when the agent said, "No, I don't want to see any papers. Pop the trunk." Thinking that the agent believed there was a trunk release inside the glove compartment, the petitioner told the agent that the trunk didn't open from the inside, but that he needed to use a key. The agent responded by saying, "I don't care. Hurry up; open the trunk." The petitioner then exited and approached the front of the vehicle. When the petitioner had difficulty in opening the trunk, the agent again stated for him to open the trunk. Believing that he would be held there until the trunk was opened, the petitioner did, in fact, open the trunk.

When the trunk was opened, the petitioner did not smell any marijuana, but only the slight smell of gasoline. Inside the trunk was a big garbage bag which the petitioner opened when directed to.

REASONS WHY THE WRIT SHOULD BE GRANTED

In *United States* v. *Ortiz*, 422 U.S. 891, 95 S.Ct. 258 (1975), the Court extended its "roving patrol" decision in

Almeida-Sanchez[2] to also invalidate vehicle searches at permanent traffic checkpoint, removed from the border and its functional equivalents, "without consent or probable cause." (422 U.S. at 897, 95 S.Ct at 2589.) The Court in *Ortiz*, however, left open the question of whether stops at fixed checkpoints are constitutionally permissible, absent consent or probable cause.

In *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074 (1976), the Court answered this question in holding that a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even in the absence of any reasonable suspicion that the vehicle contains illegal aliens. (See, discussion, 428 U.S. at 556-563, 96 S.Ct. at 3082-3084.) As in the other Border Patrol cases, the Court arrived at its decision by balancing the countervailing public and private interests. Noting the "substantiality of public interest" in routine inquiry stops at permanent checkpoints and the "quite limited" consequent intrusion on individual rights, the Court concluded that it would be impractical to always require reasonable suspicion for inland stops on major traffic routes. [3] The Court did emphasize, though, that the decision was narrowly limited to the type of stops described in the opinion and cautioned that "any further detention . . . must be based on consent or probable cause." (*Id.* at 567, 96 S.Ct. at 3087.)

The critical question not addressed by the Court in *Martinez-Fuerte*, and which constitutes the basis of this petition, is: At what point does a routine automobile "inspection" become a "search" for purposes of the Fourth Amendment?

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2. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 93 S.Ct 2535 (1973).

3. The Court reasoned that the flow of traffic is too heavy to allow the "particularized study" of an individual car which would permit it to be identified as a possible carrier of illegal aliens. In addition, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, one of the major objectives of the checkpoint system. (*Id.* at 557, 96 S.Ct. at 3082-3083.)

While the Court indicated that Border Patrol officers "must have wide discretion in selecting the motorists to be diverted for the brief questioning involved" (*Id.* at 563-564, 96 S.Ct. at 3085), the Court failed to provide any guidelines as to when the intrusion goes beyond the permissible limits that justified it in the first place, and crosses into the realm of the traditional stop that must be based on objective and articulable suspicion.

In the case at bar, the opinion states that the "[petitioner's] detention in the secondary inspection area was lawful because it only involved brief questioning and a request to open the trunk." In other words, the Court extended the *Martinez-Fuerte* reasoning to the detention in the secondary inspection area. It is submitted that this "interpretation" is not only contrary to the specific language in *Martinez-Fuerte*, but is a further unwarranted departure from basic Fourth Amendment principles. Once, as here, the Border Patrol agent satisfied himself of the citizenship of the occupant of the vehicle and that the vehicle did not obviously contain illegal aliens, any further detention had to be based on consent or probable cause. It is imperative that the Court take the opportunity to re-emphasize this principle, and to provide guidance for its application. As the Ninth Circuit has apparently misapplied this important principle, the granting of this Petition for Writ of Certiorari is clearly warranted.

ARGUMENT

A. PROLONGED DETENTION OF AN INDIVIDUAL IN THE SECONDARY INSPECTION AREA OF A PERMANENT TRAFFIC CHECKPOINT MUST BE SUPPORTED BY PROBABLE CAUSE.

In *Terry* v. *Ohio*, 392 U.S. 1, 19, fn. 16, 88 S.Ct. 1868, 1879 (1968), the Court ruled that not every questioning of a citizen by a policeman constitutes a "seizure" that requires Fourth Amendment scrutiny. The *Terry* Court made it clear, however, that an investigative stop that rests on the constraint of a show of authority is a "seizure" which must meet Fourth

Amendment standards. (See discussion, 392 U.S. at 16-19, 88 S.Ct. at 1877-1879.) *Terry* thus sanctions an approach in investigation, i.e. "stop", only "where a police officer observes unusual conduct which lends him reasonably to conclude in light of his experience that criminal activity may be afoot . . . " (*Id.* at 30, 88 S.Ct. at 1884.) And in justifying the particular intrusion:

> "The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." (*Id.* at 21-22, 88 S.Ct. at 1880; fns. omitted.)

In *Adams* v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972), the Court applied *Terry* in supporting the action of a police officer in accosting a parked motorist on the tip of a reliable informant and seizing a pistol from the motorist's waistband. The Court characterized the policeman's action as "an intermediate response", intermediate, that is, between formal arrest and non-action. (407 U.S. at 146, 92 S.Ct. at 1923.) The Court continued:

> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (*Id.*)

An investigatory stop is therefore lawful if it is made on the basis of "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown* v. *Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2641 (1979), citing *Delaware* v. *Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1396 (1979), and *United States* v. *Brignoni-Ponce*, 442 U.S. 873, 882-883, 95 S.Ct. 2574, 2581 (1975). This standard appears to

now have been firmly established by the Court as the test for the "reasonableness of seizure that are less [intensive] than a traditional arrest." *Brown* v. *Texas*, *supra*, 443 U.S. at 50, 99 S.Ct. at 2640; see also *United States* v. *Cortez*, __ U.S. __, 101 S.Ct. 690, 694-695 (1981), and *Dunaway* v. *New York*, 442 U.S. 200, 209-210, 99 S.Ct. 2248, 2254-2256 (1979).

As previously indicated, in the area of checkpoint stops, however, the Court has adopted a different standard. Due to the limited intrusion on the motoring public as compared to the governmental interest to control the flow of illegal aliens, stops for brief questioning at permanent checkpoints need not be authorized by warrant. *United States* v. *Martinez-Fuerte*, *supra*. The brief stopping and questioning of motorists at checkpoints can thus be made in the absence of any individualized suspicion, and the Border Patrol officers have wide discretion in selecting what motorists are referred to the secondary inspection area. (*Id.* at 562-564, 96 S.Ct. at 3085.) Any further detention of the motorist, however, or a subsequent search of his vehicle, may be undertaken only if supported by *probable cause* or if proper *consent* for the search has been given. (*Id.* at 566-567, 96 S.Ct. at 3087; see also *United States* v. *Ortiz*, *supra*, 422 U.S. at 897, 95 S.Ct. at 2589; *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 882, 95 S.Ct. at 2580.)

In the case at bar, the petitioner was initially referred to the secondary inspection area by Agent Schroeder because he appeared nervous during their brief contact, and the vehicle he was driving was of the type used in the past to smuggle aliens. Once in secondary, the petitioner was approached by Agent Pratt who, after determining that the petitioner was a U.S. citizen, asked him to open the trunk of the vehicle. At this point, probable cause clearly did not exist to support such a request. See, e.g., *Reid* v. *Georgia*, __ U.S. __, 100 S.Ct. 2752 (1980); *Florida* v. *Royer*, __ U.S. __, 103 S.Ct. 1319 (1983); see also *United States* v. *Patacchia*, 602 F.2d 218 (9th Cir. 1979); *United States* v. *Soto-Soto*, 598 F.2d 545 (9th Cir.

1979); *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975). Other than the lone factor of the petitioner's apparent nervousness, which it is not even clear Agent Pratt knew of, there were no other facts or circumstances that would have warranted a prudent man to believe that the petitioner was in the midst of committing an offense. The trial court, in essence, so held by upholding the search only on the alternative ground of consent.

The Ninth Circuit, however, based its affirmance partly on the ground that probable cause, or even founded suspicion, was not required for the actions taken by Agent Pratt in the secondary area. It is submitted that based on the reasons previously advanced, this statement is an incorrect interpretation of the limiting principle expressed in *Martinez-Fuerte*. The public interests found by the Court to outweigh the individual's right to privacy simply do not justify prolonged detention and questioning of the type conducted in this case. Accordingly, the Ninth Circuit was clearly in error in upholding the search on this ground.

B. THE PETITIONER DID NOT FREELY AND VOLUNTARILY CONSENT TO A SEARCH OF THE TRUNK OF HIS VEHICLE.

It is well established that when the Government seeks to rely upon consent as a means to justify the lawfulness of a search or seizure, it has the burden of proving that consent was, in fact, freely and voluntarily given. *Bumper* v. *North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792 (1968); accord, *United States* v. *Henry*, 615 F.2d 1223 (9th Cir. 1980); *United States* v. *Agosto*, 502 F.2d 612 (9th Cir. 1974). Furthermore, such waiver or consent must be proved by *clear* and *positive* testimony that the consent was given without duress or coercion, express or implied, and the Courts will indulge every reasonable presumption against the waiver of fundamental constitutional rights. *United States* v. *Abbott*, 546 F.2d 883, 885 (10th Cir. 1977); *United States* v. *Agosto*, *supra*.

While the Court must apply the "totality of circumstances" test to determine the voluntariness of the alleged consent (*Schneckloth* v. *Bustamonte* (1973) 412 U.S. 219, 93 S.Ct. 2041), whether there has been an arrest prior to consent remains a critical factor. As stated by the Ninth Circuit in *United States* v. *Rothman*, 492 F.2d 1260, 1265 (1973):

> "[The] Court must be aware of the 'vulnerable subjective state' of the defendant as well as the possibility of 'subtly coercive police questions.' *Schneckloth* v. *Bustamonte, supra*, 412 U.S. at 229, 93 S.Ct. at 2049, and the inherently coercive nature of custodial interrogation, *Id.* at 247, 93 S.Ct. 2041."

Where the individual is under arrest, "non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found." *Judd* v. *United States*, 190 F.2d 649, 651 (D.C. Cir. 1951), citing *United States* v. *Novero*, 58 F.Supp. 275 (E.D. Mo. 1944). Coercion is implicit in situations where consent is obtained under color of the badge, and the Government must show that there was no coercion in fact. *United States* v. *Page*, 302 F.2d 81, 84 (9th Cir. 1962); see also *Weed* v. *United States*, 340 F.2d 827 (10th Cir. 1965).

Application of these criteria to the case at bar strongly suggests coercion and the lack of a freely and voluntarily given consent by the petitioner. While the petitioner was not actually under arrest, he was clearly in a detention situation and was not free to leave if he so desired. Indeed, the petitioner testifed that he believed that if he did not open the trunk, he would have been held until the trunk was opened. The petitioner thus complied, but only after continual commands by Agent Pratt to open the trunk, with the indication that if he did not, he would not be able to leave.

In the case of *United States* v. *Ocheltree*, 622 F.2d 992 (9th Cir. 1980), the Court held that consent obtained under threat of being detained until a search warrant is obtained cannot be said to be voluntary. In that case, appellant was

stopped at the San Diego Airport by DEA agents and asked to accompany the agents to their office for a talk. The agents eventually asked whether they could search a briefcase the appellant was carrying. The agents advised appellant that he was under no obligation whatsoever to permit the search, and that if permission was given it could be withdrawn at any time. The agents also stated, however, that if permission was denied, the agents would attempt to get a search warrant. On these facts, the Court stated:

> "Nevertheless, the consent to search the briefcase (as distinguished from the consent to go to the agent's office) was not voluntary. When the agent informed appellant that if consent was not forthcoming he would attempt to secure a search warrant, there was a clear implication that appellant would be retained in custody until the warrant was obtained. The only reasonable construction appellant could place on the agent's statement was that appellant would not be permitted to frustrate the agent's attempt by boarding his plane and thus placing himself beyond reach of the very warrant which the agent sought to obtain . . .
>
> "Appellant contends that until after the briefcase had been searched the agents did not have probable cause to believe that he was in possession of narcotics. The government in its brief does not dispute this. Thus, retaining appellant in custody would have been an unlawful arrest under *Dunaway*. While appellant was not actually subjected to a *Dunaway* arrest, consent obtained under threat of subjecting appellant to such an arrest cannot be said to be voluntary." (622 F.2d at 994.)

The same "principle" must be applied to the case at bar as the petitioner similarly agreed to open the trunk only when

he was given the impression that he had no other choice.[4] Viewing the "totality of the circumstances," therefore, this Court must conclude that the petitioner's consent was not freely and voluntarily given. The decision by the trial court upholding the search on this ground was thus erroneous as a matter of law, and the appellate court compounded the error in affirming the trial court's ruling.

CONCLUSION

For the above-mentioned reasons, petitioner John Paul Hawthorne, respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Dated: November 7, 1983 Respectfully submitted,

MICHAEL PANCER
Attorney for Petitioner

4. Agent Pratt never explained to the petitioner that he had the right not to open the trunk, or that he could require the agent to obtain a warrant.

No. 83-5129
USDC No. CR 83-0094-N-01

APPENDIX "A"
MEMORANDUM OPINION

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

JOHN PAUL HAWTHORNE,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of California

Hon. Leland C. Nielsen,
Judge Presiding

Argued and Submitted: October 3, 1983

Appeal from the United States District Court for the Southern District of California Hon. Leland C. Nielsen, Judge Presiding

Before: Fletcher and Nelson, Circuit Judges, and Lynch,*
District Judge

John Hawthorne appeals his conviction for possession of cocaine with intent to distribute. Hawthorne contends that the trial court improperly denied his motion to suppress the cocaine and marijuana seized from his car at a Border Patrol checkpoint in San Clemente on January 21, 1983. He offers two grounds for reversal: (1) his detention in the secondary inspection area was unlawful because not supported by probable cause; and (2) he did not voluntarily consent to the search of his car trunk. Both grounds are rejected.

Stops for brief questioning at Border Patrol checkpoints do not require probable cause or founded suspicion. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). Hawthorne's detention in the secondary inspection area was lawful because it only involved brief questioning and a request to open the trunk.

The subsequent search was also lawful because the district court found that Hawthorne voluntarily had consented to the search. Such a finding is to be affirmed unless it is clearly erroneous. *United States* v. *Travelman*, 650 F.2d 1133, 1138 (9th Cir. 1981), *cert. denied*, 455 U.S. 939. In this case, the record sufficiently supports the district court's ruling on this issue, and the ruling should be upheld.

The judgment is AFFIRMED.**

---

* Hon. Eugene F. Lynch, United States District Judge, Northern District of California, sitting by designation.

** The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 31 of the rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of San Diego)

(I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of San Diego, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 520 "E" Street, Suite 1100, San Diego, CA 92101-6278 that on November 7, 1983, I served the within PETITION FOR WRIT OF CERTIORARI (HAWTHORNE vs. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of San Diego, California, addressed to said parties at the addresses as follows:

REX E. LEE
SOLICITOR GENERAL
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530 (3 copies)

MARIA T. ARROYA-TABIN,
ASSISTANT U.S. ATTORNEY
940 FRONT STREET
SAN DIEGO, CALIFORNIA 92189 (3 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 1983, SAN DIEGO, CALIFORNIA.

Michael Pancer

41 COPIES TO U.S. SUPREME COURT, WASHINGTON, D.C. 20543
$200 docket fee attached to the original copy thereof